Court of Appeals Cause No. 44035-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL MICHELBRINK, JR.,

Respondent,

vs.

STATE OF WASHINGTON, WASHINGTON STATE PATROL,

Appellant.

RESPONDENT'S SUPPLEMENTAL BRIEF ON REMAND FROM THE SUPREME COURT

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INTRODUCTION

This case is before the Court on remand from the Washington State Supreme Court to reconsider its opinion in *Michelbrink vs. WSP*, C/A No. 44035-1-II, in light of *Walston vs. Boeing*, 181 Wn.2d 391, 334 P.3d 519 (2014).

The *Walston* case supports this Court's opinion in *Michelbrink*. It again affirms the Washington position that "risk" of injury or "probability" of injury is not sufficient to meet the *Birklid*, 127 Wn.2d 853, 904 P.2d 278 (1995), test of certainty of injury.

In contrast to *Walston*, there was a certainty of injury when WSP required its Troopers to be "tased" before they could carry the Taser.

In its Introduction, WSP argues that the *Walston* court rejected the worker's effort to expand the definition of "injury". That is an incorrect reading of the case. *Walston* is consistent with *Birklid*. The "risk" of injury is insufficient.

WSP also incorrectly states that after granting WSP's Petition for Review, the Supreme Court reversed this Court's decision. While it could

have, it did not. It remanded this case to be reconsidered in light of *Walston.*

ARGUMENT

As it did before the trial judge and this Court in its earlier appeal, WSP refuses to admit that being shot with a Taser does result in an injury. The Taser, according to WSP, causes "temporary pain", and a "minor wound". This position must be contrasted with what actually occurs when a person is shot with a Taser.

The Taser shoots out probes that contain barbs which penetrate the skin. These are aluminum darts tipped with stainless steel barbs. The designer of WSP's Taser programs, Sgt. Mark Tegard, spoke of "signature marks", which is where the electricity enters the body. He prefers "signature marks" to "scarring". CP 28. At every step, WSP uses euphemisms to describe what a Taser shot actually does to the human body. It is an "exposure", leaving "signature marks". The shooting of the Taser into the human body causes the body to be incapacitated by the electric current.

Trooper Michelbrink was required to be shot with a Taser. WSP later changed this policy and made being shot with a Taser optional.

In his deposition, Trooper Michelbrink testified that he felt immediate pain, laying on the ground while the darts' "probes" were pulled out of his back. D 22-23. Later, and WSP does not dispute this medical finding, Trooper Michelbrink was diagnosed with a fracture at T5 and a cervical disc protrusion at C5. It is undisputed that these injuries were proximately caused by powerful muscle contractions as a result of being shot with the Taser. CP 32.

In its materials, WSP continues to argue that because Trooper Michelbrink continues to be paid, that somehow this excuses its conduct in causing his permanent disability. Trooper Michelbrink is now a background investigator and no longer allowed to perform law enforcement functions. He was forced to turn in his service revolver and automobile. CP 35.

The injury inflicted upon Trooper Michelbrink by the Taser was far more serious than the injuries that were found to be sufficient to meet the test in *Birklid vs. Boeing Company*. In that case, the injuries described by the employees included panic disorder, depressive disorder, headaches, nausea, sensory irritation, chemical sensitization, multiple chemical sensitivity syndrome, sleeplessness, blood in the urine, dermatitis and skin

rashes, diarrhea, vomiting, gastral intestinal distress, shortness of breath, memory loss, and organic brain syndrome.

In *Vallandigham vs. Clover Park School District #400,* 154 Wn.2d 16, 109 P.3d 805 (2005), there was no issue regarding whether the injuries were sufficient to trigger the *Birklid* holding. The issue in *Vallandigham* was whether or not the injuries inflicted by the special needs student were certain to occur, not probably. Those injuries included scratches and slaps. *Vallandigham* at page 19.

Trooper Michelbrink does not contend that the State Patrol intended to fracture his back. Trooper Michelbrink does contend that Washington State Patrol intended to injure him by shooting him with the Taser in order to show him how the Taser operates. WSP attempts to justify this requirement for educational reasons. It contends that the training is necessary. There is nothing about the Taser that could not be learned from watching video tapes. Just as there is nothing about the impact of being shot with a revolver or hit with a baton that could not be taught with video tapes. There is simply no justification for tasing one's own people.

The Sheriffs and Chief attempt to justify the tasing of its own employees by pointing out the so-called benefits. This effort to justify the risk by pointing out the benefits does not in any manner change the certain result of injury when the Taser is employed to the risk of injury or probability of injury that is reflected in the *Walston* case, the *Vallandigham* case, or the other cases cited by WSP and the Amicus. Here, the stark difference is that the State Patrol deliberately intended to injure Trooper Michelbrink, but did not anticipate that the tasing would result in the fracture of his back when his muscles contracted. However, the State Patrol knew that was a risk. At the time of Trooper Michelbrink's injuries, WSP knew that exposure to the Taser could result in the following:

> "These potential injuries include but are not limited to: cuts, bruises and abrasions caused by falling, strain-related injuries from strong muscle contractions such as muscle or tendon tears, or stress fractures."

CP 31, lines 16-19.

Sgt. Tegard in designing the Taser Training Program was himself required to sign a release before he was tased. CP 28, lines 1-2. Sgt. Tegard was obviously aware that stress fractures could occur even before he put the program together. Later, after the fractures to Trooper Michelbrink did occur, Sgt. Tegard contacted the Taser manufacturer for

help to "see if they had anymore information on other people that had a serious fracture." CP 133, lines 22-23.

Trooper Michelbrink believes that he suffered an "injury" within the definition of RCW 51.08.100. This definition is as follows:

> "'Injury' means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom."

Under this definition of "injury" found in Title 51 of the Industrial Insurance Definitions, the injury to Trooper Michelbrink fits exactly. The exposure to the darts was a sudden and tangible happening, of a traumatic nature, and produced a prompt result, and it produced a physical condition that resulted therefrom, to wit: stainless steel barbs stuck in his back through which an electrical current was sent causing immediate pain, incapacitation, and trouble breathing, which also produced a fractured vertebra and bulging disk.

CONCLUSION

WSP seeks to contrast the *Walston* decision with the *Michelbrink* decision in that the State Supreme Court spoke to a very narrow interpretation of the deliberate intention to injure. Whether the

interpretation is narrow or broad, the result in the Michelbrink case is exactly the same. The State Patrol intended to injure him as part of training; it did so, it knew the risk that the injury could be far more significant than it intended to be; and the risk was all put on Michelbrink and none on WSP. This Court should reaffirm its decision in *Michelbrink vs. WSP*.

DATED: June 5, 2015

Respectfully submitted,

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Court of Appeals Cause No. 44035-1-II

IN THE COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

MICHAEL MICHELBRINK, JR., Respondent, vs. STATE OF WASHINGTON, WASHINGTON STATE PATROL, Appellant.	CERTIFICATE OF MAILING

I, Carlene E. Kuhn, hereby certify that I am a citizen of the State of Washington, over the age of 18 years, and competent to be a witness herein. That I deposited the original and one true and correct copy of "Respondent's Supplemental Brief on Remand From the Supreme Court", in the United States mails, postage prepaid, on this 5th day of June, 2015, addressed as follows:

David C. Ponzoha, Court Clerk
Court of Appeals, Division II
950 Broadway, Ste 300, MS TB-06
Tacoma WA 98402-4454

I further deposed in the United States mails, postage prepaid, on this 5th day of June, 2015, a true and correct copy of the "Respondent's Supplemental Brief on Remand From the Supreme Court" upon the attorney for Appellant:

Steve Puz
Senior Counsel
Office of the Attorney General
P. O. Box 40126
Olympia, WA 98504

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of June, 2015, at Montesano, Washington.

CARLENE E. KUHN
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